Supreme Court, U.S.
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No. 01-230

In The

Supreme Court of the United States

CITY OF GREENWOOD VILLAGE, COLORADO,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Conflicting Decisions Turn On Opposing Legal Conclusions 3

II. Respondent Misconstrues Preemption Case Law .. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

American Airlines, Inc. v. Dept. of Transp., 202 F.3d 788 (5th Cir.), *cert. denied*, 530 U.S. 1274 (2000) 4

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 9

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 2, 5

Egelhoff v. Egelhoff ex rel. Breiner, 121 S. Ct. 1322, 532 U.S. 141 (2001) 2, 10

Morales v. Trans-World Airlines, Inc., 504 U.S. 374 (1992) 2, 9

Moran v. Rush Prudential HMO, Inc., 230 F.3d 959 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589, ___ U.S. ___ (2001) 10

National Business Aviation Association, Inc. v. City of Naples Airport Authority, 162 F. Supp. 2d 1343 (M.D. Fla. 2001) 3, 4, 5

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 2, 9, 10

Northwest Airlines v. Duncan, 531 U.S. 1058 (2000) 4

Penobscot Air Services, Ltd. v. FAA, 164 F.3d 713 (1st Cir. 1999) 4

STATUTES AND REGULATIONS

29 U.S.C. § 1144(a) 9

49 U.S.C. § 40103 5

49 U.S.C. § 41713(b) 1

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 41713(b)(1) 9

49 U.S.C. § 41713(b)(3) 4, 5

49 U.S.C. § 44701 5

49 U.S.C. § 44706(a)(2) 7

49 U.S.C. § 44901(a) 6

49 U.S.C. §§ 47101 *et seq.* 4

49 U.S.C. § 47107(a)(1) 4

14 C.F.R. Part 139 7

14 C.F.R. Part 152 8

14 C.F.R. § 107.3 6

14 C.F.R. § 107.15 6

14 C.F.R. § 108.5 6

46 Fed. Reg. 3782, 3783-84 (Jan. 15, 1981) 6

62 Fed. Reg. 29761, 29766 (June 2, 1997) 4, 5

S. Rep. No. 95-631, 95th Cong., 2nd Sess. 39, 99 (1978) 5

CONSTITUTION

U.S. CONST. ART. VI, cl. 2 4

OTHER AUTHORITIES

Pub. L. No. 91-258, 84 Stat. 219 8

Pub. L. No. 95-504, 92 Stat. 1707 ..... 1, 2, 4, 5

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 97-248, 96 Stat. 671 ..... 4, 8

Pub. L. No. 106-181, § 518, 114 Stat. 145 7

REPLY BRIEF FOR PETITIONER

The City of Greenwood Village respectfully submits this Reply Brief in support of its Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

1. Respondent's Brief in Opposition ("Brief in Opp.") fails to diminish the direct conflict presented by the decisions of the Colorado Supreme Court and the United States Court of Appeals for the Tenth Circuit regarding the breadth of express preemption under the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1707 (49 U.S.C. § 41713(b)) and the permissible scope of an airport proprietor's powers and rights. The decisions involve the same underlying facts but reach fundamentally different holdings on (1) the lawfulness of the Arapahoe County Public Airport Authority's ("Authority") ban on scheduled passenger service at Centennial Airport under the ADA, and (2) whether such ban violates the Authority's grant assurances set forth in agreements with the Federal Aviation Administration ("FAA").

2. Respondent attempts to shift the case's focus away from the important legal questions by characterizing this case as a review of FAA's factual determinations. Brief in Opp. 15-20. This analysis ignores the fact that the Colorado Supreme Court held that the ADA did not broadly preempt the Authority's proprietary powers. The Authority's decision to exclude scheduled passenger service as necessary to meet the airport's designated role as a general aviation reliever airport, consistent with existing facilities at the airport, and necessary for the safe and secure operation of the airport, "more appropriately"

fell within the Authority's proprietary powers and was a reasonable nondiscriminatory regulation. The Tenth Circuit adopted the FAA's very narrow construction of proprietary powers and assumed that all other regulatory authority was preempted. Having made these legal conclusions, the Tenth Circuit held that the Authority had failed to prove that its regulations were reasonable and nondiscriminatory and, thus, deferred to FAA.

3. Respondent's efforts to distinguish the holding in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) ("*Travelers*"), from the ADA decisions finding express preemption must also fail. Brief in Opp. at 20-23. This Court has recognized that the Employee Retirement Income Security Act of 1974 ("ERISA") and ADA preemption analyses are comparable. *Morales v. Trans-World Airlines, Inc.*, 504 U.S. 374, 384 (1992). This Court has subsequently determined that the preemption analysis is too stringent. *Travelers*, 514 U.S. at 656; *see also Egelhoff v. Egelhoff ex rel. Breiner*, 121 S. Ct. 1322, 1327, 532 U.S. 141 (2001) (discussing *Morales* and *Travelers* and following the analysis in *Travelers*).

4. While not denying the importance of the legal issues, Respondent also argues that this case does not present an appropriate occasion to resolve the scope of a local airport proprietor's powers and that the issue would benefit from further development in the lower courts. Brief in Opp. at 20, 25. To the contrary, this question has been evaluated for almost 30 years ever since *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973). The courts and the FAA have failed to consistently apply the proprietor's exception, resulting in extensive and contradictory litigation. Greenwood Pet. at 26-29.

This inconsistency most recently manifested itself in *National Business Aviation Association, Inc. ("NBAA") v. City of Naples Airport Authority,* 162 F. Supp. 2d 1343 (M.D. Fla. 2001) wherein the court held that the Naples Airport Authority's ban on all Stage 2 aircraft was not unreasonable or unjustly discriminatory. Despite the decision of a federal court, FAA recently instituted an administrative proceeding with respect to the ban as possibly violating federal grant assurances which could result in the termination of federal funding for the airport. NBAA November 6, 2001 Press Release, http://www.nbaa.org/pr/2001/20011106-055.htm.

The renewed emphasis on airport security in the wake of the terrorist attacks on domestic passenger aircraft demonstrates the compelling need to clarify the extent of local control over airport management, safety and security. This is particularly true, when, as is the case here, FAA exempts a substantial number of airports from security and air rescue and fire requirements.

ARGUMENT

I. The Conflicting Decisions Turn On Opposing Legal Conclusions

1. Respondent attempts to discount the importance of the legal issues presented by arguing that this case is only a review of FAA's findings of fact and that the Authority's exclusion of scheduled passenger service was not warranted for reasons of safety or civil aviation needs. Brief in Opp. at 16. This Court should not be swayed by Respondent's posturing of this case. The threshold issue is the contradictory and diametrically opposed decisions of the Colorado Supreme Court and the Tenth Circuit on whether the ban on scheduled passenger service relates to a "route" or "service" under the

ADA, and whether the Authority properly carried out its proprietary powers under the statutory exception to preemption, 49 U.S.C. § 41713(b)(3). These important questions are matters of law and may be reviewed *de novo*. *See Northwest Airlines v. Duncan*, 531 U.S. 1058 (2000) (disagreeing with the denial of certiorari on the important legal issue regarding the scope of the ADA's preemption provision); *Penobscot Air Services, Ltd. v. FAA*, 164 F.3d 713, 718-19 (1st Cir. 1999); *American Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 804-05 (5th Cir.), *cert. denied*, 530 U.S. 1274 (2000).

Contrary to Respondent's opposition, the question presented is not whether the exercise of proprietary powers was reasonable and nondiscriminatory based on the administrative record. *See* Brief in Opp., p. 15. Neither the Supremacy Clause, U.S. CONST. ART. VI, cl. 2, nor the ADA impose reasonableness and nondiscrimination requirements upon the exercise of proprietary powers. *See NBAA*, 162 F. Supp. 2d at 1352. Only the federal grant assurances imposed under the Airport and Airway Improvement Act of 1982 ("AAIA"), Pub. L. No. 97-248, 96 Stat. 671 (49 U.S.C. §§ 47101 *et seq.*), require limitations on aeronautical use to be reasonable and without unjust discrimination. 49 U.S.C. § 47107(a)(1); 62 Fed. Reg. 29761, 29766 (June 2, 1997) (standard grant assurances).

2. Respondent's efforts to limit this case to FAA's findings of fact flows from the incorporation of the factual inquiry as to the reasonableness of the ban into the ADA preemption analysis. FAA incorrectly states that the preemption issues were not briefed below. Brief in Opp. at 24. Preemption was the thrust of FAA's argument in the appeal and below. *See* Greenwood Pet. App. at 151a-158a. The Authority, relying on the Colorado

decision, did address this issue. Also, contrary to Respondent's argument, the Tenth Circuit held that the ADA preempted the airport's regulation. *Id.* at 17a.

The Tenth Circuit then concluded that under the ADA proprietor's exception, 49 U.S.C. § 41713(b)(3), an airport proprietor can issue only reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest and the scope of a local interest is a fact-based inquiry. Greenwood Pet. App. 19a. According to the Tenth Circuit, therefore, ACPAA's proprietary rights are limited by its obligations under its grant assurances, and as a result, only regulatory conduct necessary for the civil aviation needs of the public or the safe operation of the airport constitutes reasonable and just discrimination. *Id.* *See also* 62 Fed. Reg. at 29766.

The FAA's Director's Determination also incorporated the factual inquiry regarding the Authority's compliance with its grant assurances into its ADA preemption analysis. Pet. App. at 151a, 155a. The case law that supports this interpretation is based on a footnote in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973) wherein the supporting text did not represent the opinion of the Supreme Court, but the opinion of the Secretary of Transportation in a letter to the Senate. *See NBAA*, 162 F. Supp. 2d at 1352.

3. The federal statutory scheme distinguishes between FAA's exclusive control over airspace and air safety, 49 U.S.C. §§ 40103, 44701, and an airport operator's prerogative to make its own decisions pertaining to on-the-ground safety, security, and permissible operations consistent with state law and regional airport planning. *See* S. Rep. No. 95-631, 95th Cong., 2nd Sess. 39, 99 (1978) (preemption "should not be construed to affect or limit existing proprietary rights of airport operators to

manage, operate, or regulate airports"). As the Colorado Supreme Court succinctly explained, the "power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated." Greenwood Pet. App. at 191a-192a.

As one example, Congress delegates passenger screening duties to air carriers. 49 U.S.C. § 44901(a). FAA regulations do not require passenger screening or an airport operator security program for air carrier operations designed for less than 31 passenger seats. 14 C.F.R. §§ 107.3, 108.5. Only if this threshold is met must an airport operator provide adequate law enforcement. *Id.* at § 107.15. In not extending the regulations to under 31 passenger operations, the FAA reasoned that the economic burden imposed on small airports and airplane operators outweighed the minimal security threat to the commuter category. 46 Fed. Reg. 3782, 3783-84 (Jan. 15, 1981).

4. As an uncertificated small airport, therefore, Centennial is not subject to federal security or air rescue and fire requirements. The September 11th tragedy illustrates the fallacy of assuming that the costs of additional security measures outweigh safety issues. The Authority has always maintained that it does not have adequate terminal and security facilities for passenger safety or an on-site fire and rescue team to deal with a passenger plane crash. *See* Greenwood Pet. App. at 11, 194a.

5. FAA's cost-benefit approach has had tragic results. In 1996, a runway collision at Quincy Municipal Airport, Illinois involving a Part 135 scheduled passenger flight killed all passengers and crew. Contributing to the severity of the accident and the loss of life were the lack of adequate aircraft rescue and fire fighting services at

the airport. National Transportation Safety Board ("NTSB") Report No. AAR-97/04, p. vi (July 1, 1997), http://www.ntsb.gov/Publictn/1997/AAR9704.pdf.

All occupants died of carbon monoxide intoxication from the inhalation of smoke and soot from the post impact fire. Witnesses who ran to the scene heard sounds of life from within the cabin of the passenger aircraft. The Quincy Fire Department was 10 miles away and did not arrive for 14 minutes. In contrast, 14 C.F.R. Part 139 requires that a Part 139 certificated airport be capable of an immediate response time of 3 minutes. NTSB Report at 48, 51.

The NTSB accident report referred to its prior recommendation and its "strong belief" that FAA should propose legislative amendments to its 14 C.F.R. Part 139 airport certification requirements, which include safety and firefighting standards, that apply to all scheduled passenger operations, regardless of aircraft size. *Id.* at 28-29. The FAA, however, declined to adopt the NTSB recommendation and only supported a 9-seat passenger requirement in its legislative proposal to Congress. *Id.* In 1996, Congress adopted FAA's proposal, 49 U.S.C. § 44706(a)(2); Brief in Opp. at 14.[1]

6. If, however, the Authority's decisions pertaining to the safe operation of the airport and the civil aviation needs of the public are a valid exercise of proprietary powers, then the initial deference is to the Authority not the FAA. As the Tenth Circuit adopted FAA's view of narrow proprietary authority, the deference went to FAA. Thus, the issue of a statutory grant assurance's effect on

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[1] This month FAA failed to comply with Congress' mandate that it complete the rulemaking to implement the 1996 amendments. Pub. L. 106-181, § 518, 114 Stat. 145.

statutorily delegated proprietary powers is directly presented and well suited for resolution by this Court.

7. Respondent also claims that Petitioners erroneously cite to the grant assurances set forth in 14 C.F.R. Pt. 152 App. D, Opp. Brief at 3 n.2. The Authority and FAA, however, continue to be bound by grant agreements issued under the Airport and Airway Development Act of 1970 ("AADA"), Pub. L. No. 91-258, 84 Stat. 219, as well as earlier grant programs, and not just grants awarded under the AAIA.

Exhibit A shows that the majority of FAA's federal grants to the Authority for the acquisition of airport property were issued under the AADA and the predecessor grant program, not the AAIA.[2] The significance of Respondent's oversight lies in the fact that many federal grants for airport facilities and development, and their respective assurances, expire 20 years after their execution. There is no limit on the duration of the assurances with respect to real property acquired with federal funds, unless and until the Authority sells the land. *See* C.A. Vol. VI.29; FAA Order 5190.6A at 2-2. Each valid grant agreement, therefore, whether or not issued under past grant programs, must be reviewed in order to determine the airport owner's obligations. *Id.* at 2-1(a). Thus, due to the

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[2] Exhibit A is a map of the airport depicting the parcels of land acquired pursuant to various FAA grants (Airport Development Aid Program ("ADAP"), Federal Airport Aid Program, and the current Airport Improvement Program). A copy of this map is lodged with the Clerk for the convenience of the Court. The map is a part of a document included in the administrative record but inadvertently omitted. C.A. Vol. XV.8, p.3a (Sept. 23, 1997 FAA Centennial Airport AIP Grant Agreement and Application).

many ADAP grant agreements used for the acquisition of land, Part 152 regulations apply to this case.

II. Respondent Misconstrues Preemption Case Law

1. Respondent attempts to distinguish the preemption analysis used by this Court in *Travelers*, 514 U.S. at 656, as it applies to whether the Authority's ban is "related to" a route or service of an air carrier under the ADA, 49 U.S.C. § 41713(b)(1). Brief in Opp. at 20-22. According to Respondent, *Travelers* must be distinguished because it concerned ERISA, which supersedes state laws as they "relate to any employee benefit plan." Brief in Opp. at 22, *citing* 29 U.S.C. § 1144(a). Respondent, however, conspicuously fails to address the critical fact that the Supreme Court in *Morales* directly relied on its previous interpretation of ERISA's "relate to" phrase in construing ADA's same language as having a broad preemptive purpose. *Morales*, 504 U.S. at 384.

In *Travelers*, the Supreme Court explained that it may have interpreted the "relate to" language in ERISA too broadly and redefined the preemption analysis starting with the presumption that Congress did not intend to supplant state law and then examining whether the state law contradicted the congressional objectives in enacting the preemption provision. *Travelers*, 514 U.S. at 656. *Travelers*, therefore, is controlling in this case because it modifies *Morales* and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995) in construing ADA preemption, which focused only on the ADA's plain meaning.

2. The Tenth Circuit, however, failed to apply the *Travelers* analysis in "easily" concluding the Authority's ban related to both services and routes and was therefore preempted. *See* Greenwood Pet. 23. In direct conflict, the

Colorado Supreme Court followed the direction in *Travelers* and held that the ban was not preempted under the ADA because the regulation did not undermine its purpose. *Id.* at 22. Thus, given the narrower interpretation of preemptive effect in *Travelers*, the Court needs to resolve these contradictory holdings on the issue of ADA express preemption. This issue has been the focus of Supreme Court review in the ERISA context and is equally important under the ADA as it pertains to the nation's airports. *See Egelhoff v. Egelhoff ex rel. Breiner*, 121 S. Ct. at 1327; *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589, ___ U.S. ___ (2001) (granting review on "relate to" phrase in ERISA).

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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